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No. 94-47

In The

Supreme Court of the United States

October Term, 1994

JOHN H. CAMPBELL, M.D.,

Petitioner,

versus

SHARLISIA SUTTLE WILLIAMS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

ANDREW T. CITRIN
(Counsel of Record)
MICHAEL A. WOREL
JOHN T. CROWDER, JR.
DAVID G. WIRTES, JR.
CUNNINGHAM, BOUNDS, YANCE, CROWDER AND BROWN
Post Office Box 66705
Mobile, Alabama 36660
205-471-6191

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether Alabama's non-apportionment rule, which is designed to promote the state's social policy of protecting human life by holding all culpable tortfeasors liable for the full measure of damages assessed by the jury, violated petitioner's due process or equal protection rights where petitioner was provided the full panoply of post-judgment protections approved in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991).

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STATEMENT OF THE CASE

Factual Background

This petition arises out of an Alabama state court judgment against the petitioner, Dr. John H. Campbell, for causing the wrongful death of respondent's decedent, Ms. Lillie Mae Sumpter. On March 9, 1987, Ms. Sumpter suffered second and third degree burns on her face, mouth, and neck when 2850°F molten steel spewed on her during the course of her employment. Ms. Sumpter was immediately taken to the Holy Name of Jesus Hospital, which was located near her job site in Gadsden, Alabama. Pet. at 1a.

The Holy Name of Jesus Hospital is not a specialized burn treatment facility; however, like many hospitals, it had specific written policies and procedures for dealing with major burn patients. Pet. at 2a. Those procedures required that patients with severe burns in the vicinity of the mouth (such as Ms. Sumpter) be transferred to a specialized burn treatment facility, such as the one located at the hospital at the University of Alabama at Birmingham (U.A.B.) in Birmingham, Alabama. Pet. at 2a. The hospital's procedures were consistent with the standard of care in the national medical community which also required the transfer of major burn patients. Trial Transcript [hereinafter Tr.] at 657. Despite the fact that both the standard of care and the hospital's policies required Ms. Sumpter's transfer to U.A.B., Dr. Campbell, who is a general surgeon, not a burn specialist, decided to admit Ms. Sumpter as his patient. Pet. at 1a; Tr. at 418.

The standard of care for patients who suffer severe burns in the vicinity of the mouth requires an examination of the patient's airway with a fiber-optic bronchoscope to determine whether the patient has suffered inhalation burns inside of her mouth and trachea. Tr. at 652. Inhalation burns are particularly common when the patient suffers facial burns because the air inhaled by the patient (while being burned) is often extremely hot. Tr. at 651. If the fiber-optic bronchoscopy reveals burns in the patient's airway, the standard of care requires that the patient be intubated to prevent the swelling from the burns inside the mouth and trachea from closing off the patient's airway. Tr. at 658. Despite the severity of Ms. Sumpter's burns in the vicinity of her mouth and the extreme heat generated by the molten steel that burned

her, Dr. Campbell did not examine Ms. Sumpter's airway with a fiber-optic bronchoscope, nor did he intubate her. Pet. at 2a.

Within hours of her arrival at the hospital, Ms. Sumpter's eyes and lips had swollen shut. Pet. at 2a. Despite Ms. Sumpter's swelling and the obvious possibility that her airway was closing off, Dr. Campbell, once again, did not order that Ms. Sumpter be intubated, nor did he conduct the fiber-optic bronchoscopy to determine whether such swelling was in fact occurring. Pet. at 2a.

As Ms. Sumpter's swelling worsened, she began to experience respiratory distress, having such difficulty breathing that she was "gasping" for air. Pet. at 2a; Tr. at 104-05. With each breath, Ms. Sumpter made audible "wailing" or "crowing" sounds in an attempt to get air into her lungs. Pet. at 3a. On several occasions, Ms. Sumpter had such difficulty breathing that her body "thrashed" about on her bed. Tr. at 114.

When Ms. Sumpter began having trouble breathing, the attending nurse made several attempts to contact Dr. Campbell to inform him of Ms. Sumpter's condition and to request orders about the proper treatment. Pet. at 3a. When she finally reached Dr. Campbell on the telephone, he ordered that Ms. Sumpter be immediately intubated. Pet. at 3a. However, the severe swelling in her mouth, tongue, and trachea made intubation impossible. Pet. at 3a. At that point, Dr. Campbell ordered that an emergency tracheostomy be performed. Pet. at 3a. According to the nurse, Dr. Wilfredo Grana, the emergency room physician on duty, was summoned to Ms. Sumpter's room to perform the emergency tracheostomy. Pet. at 3a. According to Dr. Grana, however, he was not present at

the hospital at the time of Ms. Sumpter's respiratory distress. Pet. at 4a. In any event, no one performed an emergency tracheostomy until after Ms. Sumpter suffered complete respiratory arrest. Pet. at 2a. Ms. Sumpter stopped breathing at 7:11 a.m. on March 10, 1987, a little over 21 hours after she was admitted to the hospital. Tr. at 132-33. Although she was eventually revived through emergency resuscitative measures, she lapsed into a coma from which she died on April 15, 1987. Pet. at 2a. The testimony at trial revealed that, with proper treatment, Ms. Sumpter would have survived her burns with the need for only cosmetic surgery. Tr. at 330.

After Ms. Sumpter was revived, but while she still remained in a coma, Dr. Campbell, apparently realizing the terrible blunder he had committed, persuaded another doctor to *change* his records to reflect that Ms. Sumpter's respiratory arrest was due to a "sudden coughing spell" which had dislodged a mucous plug which in turn blocked her airway. Pet. at 2a-3a. In fact, this was the description Dr. Campbell contrived when he wrote his own summary of the events which led to Ms. Sumpter's respiratory arrest. Pet. at 3a. However, the attending nurse, who was with Ms. Sumpter during her *entire* respiratory distress, testified that no such coughing spell ever occurred. Pet. at 3a.

COURSE OF PROCEEDINGS BELOW

On February 17, 1989, Sharlisia Suttle Williams ("Ms. Williams"), as administratrix of the estate of Ms. Sumpter,

filed suit against Dr. Campbell, Dr. Grana, and the hospital. After hearing eight days of evidence, the jury returned a verdict finding Dr. Campbell and the hospital jointly liable for Ms. Sumpter's death. Pet. at 4a. The jury returned a verdict in favor of Dr. Grana, apparently believing his testimony that he was not present at the time Ms. Sumpter suffered respiratory distress. Pet. at 4a. The Alabama Supreme Court explained the jury's verdict as follows:

> "This case went to the jury against three defendants: the Hospital, Dr. Wilfredo Grana, and Dr. Campbell. The jury returned a verdict in favor of Dr. Grana, and against the Hospital and Dr. Campbell. The case was submitted to the jury against the Hospital on three theories: vicarious liability for the alleged negligence of Dr. Grana in failing to perform a tracheostomy; independent negligence for failing to ensure that Dr. Grana was qualified to perform a tracheostomy; and vicarious liability for the alleged negligence of the nurses in failing to enforce the Hospital's policy regarding the transfer of burn patients. The case was submitted to the jury against Dr. Campbell on [three] separate negligence claims: that he deviated from the standard of care by not transferring the patient to the burn unit at U.A.B., as required by the Hospital's policy regarding treatment of major burn patients, by failing to examine the patient's airway by use of a fiber-optic bronchoscope, and by failing to intubate the patient.
>
> "The jury found in favor of Dr. Grana; therefore its verdict against the Hospital was based either upon the jury's finding that the nurses were negligent in not enforcing the Hospital's policy concerning transfer of burn

> patients, or upon the Hospital's failure to ensure that Dr. Grana was qualified to perform a tracheostomy."

Pet. at 14a.

Pursuant to Alabama's wrongful death statute, which permits the assessment of punitive damages only, the jury returned a joint verdict against both Dr. Campbell and the hospital for $4 million. Pet. at 4a. During the jury's deliberations, however, the hospital settled with Ms. Williams on the basis of a hand-written "high low" agreement, which was contingent upon the jury's finding of liability against the hospital.[1] Pet. at 5a. Since the jury found the hospital jointly liable with Dr. Campbell and assessed damages in excess of $1 million, the hospital paid $1 million under the settlement agreement, leaving a $3 million balance against Dr. Campbell alone. Pet. at 5a. The trial court entered judgment against Dr. Campbell for $3 million.

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[1] The settlement agreement read as follows:

"(1) Verdict Against Hospital & Campbell – cap of 1 million on Hospital. Floor of 750,000 – regardless of amount of verdict.

"(2) Verdict Against Hospital without Campbell –

A) Anything under 750,000 – Hospital pays 750,000.

B) Anything over 750,000 – Hospital pays actual amount up to *1 million*.

"[(3)] Verdict in favor of Hospital – Hospital pays 700,000 – Seven hundred thousand – .

"[(4)] *Mistrial* – No settlement."

Following trial, Dr. Campbell filed a motion for a new trial and/or remittitur of the $3 million judgment entered against him.[2] Pet. at 39a. At Dr. Campbell's request, the trial court conducted a hearing during which it entertained Dr. Campbell's arguments concerning the alleged excessiveness of the jury's verdict and the alleged unfairness of requiring him to pay the balance of the punitive judgment which was entered against both him and the hospital. Pet. at App. B. After the hearing, during which Dr. Campbell submitted false sworn testimony about his annual income and net worth, the trial court entered a lengthy order finding that the remaining amount of the jury's verdict was fully justified given the severity of Dr. Campbell's misconduct, his ability to pay the judgment, his efforts to cover-up his wrongdoing, and the need to deter others in the future. Pet. at 48a-52a.

Dr. Campbell then appealed the trial court's judgment to the Alabama Supreme Court, which conducted a *de novo* review of the $3 million judgment. Pet. at App. A. In a 30-page opinion, the Alabama Supreme Court affirmed the judgment in its entirety, independently concluding that the $3 million judgment was not excessive given the specific facts and circumstances of this case.

Importantly, a large portion of the Alabama Supreme Court's opinion is dedicated to the issue of the constitutionality of Alabama's non-apportionment rule. Pet. at

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[2] Dr. Campbell did not, and has not, challenged the sufficiency of the evidence.

5a-15a. After thoroughly reviewing the history and purpose of Alabama's Wrongful Death Act, and the numerous state and federal opinions which have upheld its constitutionality, the Alabama Supreme Court held:

> "The nonapportionment of punitive damages among multiple defendants in wrongful death cases bears a rational relationship to a legitimate state interest – the prevention of homicide – and it thus does not violate constitutional guarantees."

Pet. at 14a. The court explained the rationale of its decision as follows:

> "Dr. Campbell contends that, because the jury is prohibited by law in this case from rendering separate verdicts against each defendant, the jury was unable to assess his individual liability for the death of Ms. Sumpter and, thus, the $3 million verdict rendered against him constitutes more than his fair share of the total liability for her death and is disproportionate to his wrongdoing. He argues that the nonapportionment rule, as applied to him in this case, violates his constitutional rights.
>
> * * *
>
> "We note that Alabama has historically treated actions resulting in death differently from actions causing lesser injuries. The 'enormity of the wrong' justifies the difference in treatment. The Alabama legislature, beginning in 1852, first sought 'to prevent homicides' by the enactment of a wrongful death statute. By allowing punitive damages to be assessed against multiple defendants in wrongful death actions without apportionment based upon the

degree of culpability of each, the legislature is 'attempting to preserve human life by making homicide expensive'. *Louis Pizitz Dry Goods Co., supra*, 274 U.S. at 116. Participation in actions causing the death of a human being, even if slight, can result in liability without regard to the degree of culpability, and this result, the legislature believes, will lead to greater diligence in avoiding the loss of life. The legislature has authorized the jury to ascertain an amount of damages appropriate to the goals sought to be achieved – preservation of life because of the enormity of the wrong, the uniqueness of the injury, and the finality of death. Where the enormous wrong results from the combined actions of several tortfeasors, the relative culpability of multiple defendants is only one factor that the jury may consider. Because the policy of this state is to regard human life as being beyond measure in terms of dollars, the jury must disregard the decedent's wealth or lack of wealth, it must disregard the decedent's potential for accumulating great wealth or lack of potential to accumulate wealth; and it must disregard his or her talents or education, or lack of them, as well as his or her station in life. The jury's consideration of the 'enormity of the wrong' includes assessing the finality of death, the propriety of punishing the wrongdoer or wrongdoers, whether the death could have been prevented, and, if so, the lack of difficulty that would have been involved in preventing the death, as well as the public's interest in deterring others from committing the same or similar wrongful conduct."

Pet. at 12a-13a. Following the denial of his application for rehearing in the Alabama Supreme Court, Dr. Campbell filed a timely petition for a writ of certiorari in this Court.

SUMMARY OF ARGUMENT

The petition should be denied. No special or important reason warrants this Court's review. No "conflict" exists within the meaning of Rule 10. Alabama's non-apportionment rule is strictly a matter of one state's preference for a particular tort law principle which promotes the valid social policy of deterring the negligent destruction of human life. Although many jurisdictions have rejected the non-apportionment rule, they have done so because of a policy preference, not constitutional mandate. Not one of the cases cited by petitioner discusses the non-apportionment rule in the context of a constitutional requirement. Thus, a "conflict" exists only in the sense that the various jurisdictions have developed different rules for the apportionment of punitive damages. None of these cases even suggest that federal constitutional principles require an apportionment rule.

Even if this Court were to hear this case, the petition will ultimately fail because Alabama's non-apportionment rule does not violate petitioner's due process or equal protection rights. Alabama's non-apportionment rule is rationally related to a legitimate state purpose. For over a century, Alabama has ardently protected human life by making the negligent destruction of human life expensive. In *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927), this Court allowed Alabama to impose

"extraordinary liability" in wrongful death cases in order to further its special social policy of preserving human life. *Pizitz*, 274 U.S. at 116. The "extraordinary liability" permitted in *Pizitz* was the imposition of punitive damages against a *completely innocent principal* for the acts of a negligent agent. *Id.* at 116. The decision in *Pizitz* was later reaffirmed in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), when this Court permitted Alabama to impose punitive damages against a principal for the intentional fraud of an insurance agent. *Haslip*, 499 U.S. at 14. In both cases, this Court held that the imposition of punitive damages against the corporations did not violate due process because they were able "to guard substantially against the evil to be prevented." *Pizitz*, 274 U.S. at 116; *Haslip*, 499 U.S. at 14.

The present case is analogous to this Court's decisions in *Pizitz* and *Haslip*. The issue before the Court is once again whether the imposition of punitive damages against one defendant based in part upon the culpability of another (in this case a joint tortfeasor) violates the United States Constitution. Given the holdings in *Pizitz* and *Haslip*, the non-apportionment rule easily passes constitutional scrutiny because, unlike vicarious liability for punitive damages, the non-apportionment rule applies only when all the defendants *are* guilty of wrongdoing. If a state may constitutionally impose punitive damages against a completely innocent party, surely it may impose disproportionate liability against those who are guilty of wrongdoing, particularly when the genesis of the liability is the death of a human being.

Finally, both the trial court and the Alabama Supreme Court made an individualized assessment of the $3 million jury verdict. Both courts determined that the verdict was not excessive after examining, among other things, petitioner's culpability, his ability to pay, and the future deterrence of others. Therefore, the procedures approved of in *Haslip, supra,* were utilized in this case.

REASONS FOR DENYING THE PETITION

I. NO SPECIAL OR IMPORTANT REASONS EXIST FOR THIS COURT TO REVIEW ALABAMA'S NON-APPORTIONMENT RULE

Alabama's non-apportionment rule does not possess any of the characteristics this Court considers "special and important" under Rule 10.1. Sup. Ct. R. 10.1. Alabama's decision to adopt a non-apportionment rule in wrongful death cases is purely a matter of one state's preference for a tort law which in no way implicates any federal constitutional provisions.

While other states follow different apportionment rules, Alabama's non-apportionment rule does not "conflict" with the other states within the meaning of Rule 10.1. The "conflict" between the courts is not a conflict related to the federal constitution, but is simply a difference of judicial preference in interpreting state laws, a right preserved to the states. "[T]he Fourteenth Amendment gives the federal courts ***no power*** to impose upon the States their views of what constitutes wise economic

or social policy." *Dandridge v. Williams*, 397 U.S. 471, 487-86 (1970) (emphasis added). Alabama's non-apportionment rule reflects the state's social policy to vehemently protect life and is therefore outside the scope of review this Court has defined for itself. This Court should, therefore, deny the petition.

A state's decision to allow apportionment, or, as in this case, to not allow apportionment, does not implicate the federal constitution. In fact, none of the cases cited by petitioner concerning the so-called "conflict" even mentions the constitutional ramifications of an apportionment rule. The different rules regarding apportionment followed by the various states indicate nothing more than that the states are not uniform in their approach to this issue. This, however, does not merit certiorari review.

If this Court were to review every area of the law where state courts "conflict" in the fashion described by petitioner, this Court would be essentially relegated to the task of creating a uniform common law which would supersede any "conflicting" approaches followed by the states. Consider, for example, the area of comparative negligence. Although "almost every common law jurisdiction in the world and 46 American states have replaced the outmoded doctrine of contributory negligence with some form of the doctrine of comparative negligence," *Williams v. Delta International Machinery Corp.*, 619 So. 2d 1330, 1334 (Ala. 1993) (Hornsby, C.J., dissenting), after nearly 170 years, the vestiges of the doctrine of contributory negligence remain in some states. *Williams*, 619 So. 2d at 1333. Even the states which have adopted comparative negligence "conflict" in their different applications of comparative fault. *See generally*

Thomas R. Trenkner, Annotation, *Modern Development of Comparative Negligence Doctrine Having Applicability to Negligence Actions Generally*, 78 A.L.R.3d 339 (1977 & Supp. 1993). These "conflicts," however, do not implicate the due process or equal protection clauses; rather they relate strictly to the states' preference for one rule of tort law over another – a matter this Court has traditionally left to the states. Although petitioner's arguments may be well-suited for the floor of the Alabama legislature, they do not implicate federal constitutional concerns.

> "For this Court to approve the invalidation of state economic ***or social regulation*** as 'overreaching' would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought.' "

Dandridge v. Williams, 397 U.S. 471, 484 (1970) (emphasis added).

The different approaches followed by the states in the area of apportionment were addressed by the Second Circuit in *McFadden v. Sanchez*, 710 F.2d 907 (2d Cir. 1983):

> "At one time common law judges regularly instructed juries to award punitive damages jointly against all defendants or not to award them at all. J. GHIARDI & J. KIRCHER, *Punitive Damages* § 9.09, at 27 (1981). In some jurisdictions punitive damages were jointly assessed based on the behavior of the most culpable defendant, and in others a joint assessment was made based on the behavior of the least culpable defendant. Comment, *Exemplary Damages and*

Joint Tortfeasors, 18 Wash. & Lee L. Rev. 270, 271-72 (1961).

> "In modern times American jurisdictions have come to the conclusion that punitive damages should be assessed on an individual basis."

McFadden, 710 F.2d at 913. Although most states have adopted an apportionment rule in punitive damages cases, historically, each state has been free to adopt whichever rule it believes will best further its social policy. As long as that policy choice furthers a legitimate state interest, *see infra* section II.B., the Constitution is not violated.

Similarly, no "conflict" exists within the meaning of Rule 10.1 between Alabama's non-apportionment rule and any decisions of the federal courts of appeals. In *Smith v. Lightning Bolt Productions, Inc.*, 861 F.2d 363 (2d Cir. 1988), for example, the Second Circuit, in an action alleging fraud, breach of fiduciary duty, and breach of contract, decided against non-apportionment *after interpreting New York state law.*[3] *Smith*, 861 F.2d at 371. Even in the federal cases which have independently adopted an apportionment rule, the courts specifically recognized that the decision was truly a matter of policy preference, rather than a product of constitutional mandate. *See McFadden v. Sanchez*, 710 F.2d 907 (2d Cir. 1983); *Davidson v. Dixon*, 386 F. Supp. 482 (D. Del. 1974). In *McFadden v. Sanchez*, 710 F.2d 907 (2d Cir. 1983), for example, the court adopted an apportionment rule for section 1983 claims. In

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[3] Procedurally, the issue of non-apportionment was not even properly before the Second Circuit since it had not been raised by either party. *Smith*, 861 F.2d at 374.

so doing, the court recognized that the issue of whether to apportion punitive damages varied among the various American jurisdictions:

> "While th[e apportionment] rule has not been adopted in every jurisdiction, *see, e.g., New York Times v. Sullivan*, 376 U.S. 254, 262, 84 S. Ct. 710, 716, 11 L. Ed. 2d 686 (1964) (Alabama law); *Gaston v. Gibson*, 328 F. Supp. 3 (E.D. Tenn. 1969), it is the majority rule. Moreover, it is accepted by commentators as the better view. Thus, to the extent that common law authority aids interpretation of section 1983, a construction requiring individual assessment of punitive damages is indicated."

Id. at 913-14 (citations omitted).

Thus, while there is a distinct minority and majority view on the issue of apportionment of punitive damages, Alabama's non-apportionment rule does not "conflict" with other jurisdictions within the meaning of Rule 10. Rather, other jurisdictions simply view the apportionment rule as a "better" rule. Alabama remains free to decide which version of tort law it will apply to punitive damage awards under its unique wrongful death statute. This Court does "not, of course, invalidate state law simply because [it] doubt[s a state's] wisdom." *Gertz v. Welch*, 418 U.S. 323, 349 (1974).

In sum, Alabama's non-apportionment rule reflects only that Alabama prefers not to apportion punitive damages among joint tortfeasors. Although other states have rejected this rule as outdated, the "conflict" concerns only a policy choice which has traditionally been left to the

states. Thus, no "special and important reasons" warrant this Court's review within the meaning of Rule 10.

II. ALABAMA'S NON-APPORTIONMENT RULE IS CONSTITUTIONAL

Even if this Court decides to hear this case, the decision below will ultimately be affirmed because the non-apportionment rule does not violate the Due Process Clause or the Equal Protection Clause.

A. ALABAMA'S NON-APPORTIONMENT RULE DOES NOT VIOLATE THE DUE PROCESS CLAUSE

Petitioner's right to procedural due process has not been violated. Even though the contours of due process are vague, the review of a due process challenge "demands of judges . . . ***alert tolerance toward views not shared***." *Rochin v. California*, 342 U.S. 165, 171-72 (1952) (emphasis added). Thus, actions violative of the due process clause must "do more than offend some fastidious squeamishness or private sentimentalism," but must "shock[ ] the conscience." *Id.* at 172.

Petitioner has not shown that Alabama's non-apportionment rule "shocks the conscience." Instead, petitioner has simply pointed out that other state courts have adopted an apportionment rule and that ***those*** courts might find Alabama's non-apportionment rule offensive to ***their*** "private sentimentalism."

The Alabama Supreme Court's decision is fully consistent with this Court's 1927 review of an analogous

issue arising from Alabama's Wrongful Death Act. In *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927), the petitioner argued that vicarious liability for punitive damages against one who was completely innocent of any wrongdoing violated due process. Rejecting this argument, this Court held:

> "As interpreted by the state court, the aim of the present statute is to strike at the evil of the negligent destruction of human life by imposing liability, *regardless of fault*, upon those who are in some substantial measure in a position to prevent it. We cannot say that it is beyond the power of the legislature in effecting such a change in the common law rules, to attempt to preserve human life by making homicide expensive."

Id. at 115-117 (emphasis added).

Similarly, in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), this Court held that Alabama's common law rule allowing the imposition of punitive damages against a completely innocent principal for the acts of its agent did not violate due process. *Id.* at 14. This Court reasoned that the imposition of "exemplary damages on the corporation when its agent commits intentional fraud creates strong incentive for vigilance by those in a position 'to guard substantially against the evil prevented.' " *Id.* (quoting *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 116 (1927)). In permitting the imposition of punitive damages against someone who did not himself contribute to the plaintiff's injury, this Court followed its prior holding in *Pizitz*.

Although *Haslip* and *Pizitz* did not specifically consider the non-apportionment rule, the liability imposed by the non-apportionment rule is less burdensome than the liability imposed in *Haslip* and in *Pizitz*. In those cases, the corporate defendants were held liable for punitive damages even though they were completely innocent of any wrongdoing (i.e., it was their agents who committed the wrongdoing). Even though the principals were not directly guilty of any wrongdoing, this Court held that due process did not prohibit the imposition of punitive damages because they were able, "in the management of their affairs, to guard substantially against the evil to be prevented." *Haslip*, 499 U.S. at 14; *Pizitz*, 274 U.S. at 116.

In contrast, the non-apportionment rule applies only when all defendants *are* guilty of misconduct. Therefore, under this Court's holding in *Haslip* and *Pizitz*, the non-apportionment rule may, without offending due process, impose "extraordinary liability" upon defendants who are not as guilty as others (assuming, *arguendo*, that were true in this case), but who were able, "in the management of their affairs, to guard substantially against the evil to be prevented." As demonstrated in the statement of the case, the jury found Dr. Campbell personally liable for causing Ms. Sumpter's death. In fact, as noted by the lower court, Pet. at 14a, Dr. Campbell was the primary tortfeasor responsible for Ms. Sumpter's death.[4]

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[4] Actually, it was *Dr. Campbell's negligence* which initiated the whole series of events which led to the hospital's liability. In essence, the hospital was found liable because it did not "catch" Dr. Campbell's errors before it was too late. The primary theory

Furthermore, petitioner's contention that Alabama's non-apportionment rule violates the principles enunciated in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), is wholly without merit. Although the Court in *Haslip* did not specifically consider whether Alabama's non-apportionment rule violated due process, this Court did approve Alabama's punitive damage procedures. *Haslip*, 499 U.S. at 22. Specifically, this Court held that Alabama provided adequate procedural safeguards against arbitrary punitive damage awards. *Id.* at 22. The procedural safeguards approved by this Court include a proper jury instruction and a separate and independent post-verdict review by both the trial court and an appellate court. *Id.*

Each of the three *Haslip* procedural due process protections were observed in this case. Petitioner concedes that the trial court properly instructed the jury on punitive damages. Pet. at 16. Petitioner contends, however, that Alabama's non-apportionment rule denied him an "individualized assessment of appropriate deterrence and retribution." *Haslip*, 499 U.S. at 20. This is not the case. Although the jury returned a general verdict against both petitioner and the hospital (i.e, the total amount of damages the jury believed would advance Alabama's social policy of punishment and deterrence), the general verdict was "individualized" because both the trial court

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against the hospital was that its *nurses* did not override the decision of a *physician* (to admit Ms. Sumpter as a patient) – an obviously difficult thing for a nurse to do. In other words, Dr. Campbell was found liable for acts of active malfeasance or commission, whereas the hospital was found liable only for acts of passive nonfeasance or ommission.

and the appellate court reviewed the verdict and considered the *isolated* impact of that verdict on petitioner in light of his wrongdoing. Specifically, in this case, because the hospital settled with Ms. Williams, petitioner received an "individualized assessment" of the remaining $3 million judgment. Both the trial court and the Alabama Supreme Court reviewed petitioner's actions, *and only his actions*, to determine whether the $3 million judgment was excessive against him.[5] Therefore, petitioner's claim that the application of the non-apportionment rule eliminates the procedures approved in *Haslip* is unfounded.[6]

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[5] Dr. Campbell asserts (Pet. at 19), that in "multiple" defendant cases, the trial court must follow the *Haslip* procedures as to each individual defendant, but must apply them to a verdict covering all defendants. This assertion is erroneous. As in this case, Alabama's post-judgment review procedures ensure that *each* defendant receives an *individualized* assessment of the jury's verdict as it applies to *his* particular circumstances (i.e. *his* culpability and *his* ability to pay the judgment); these procedures ensure, even in multiple defendant cases, that the amount of punitive damages actually recovered from each defendant does "not exceed an amount that will accomplish society's goals of punishment and deterrence." *Industrial Chemical v. Chandler*, 547 So. 2d 812, 837 (Ala. 1988).

[6] Nor does Alabama's non-apportionment rule violate substantive due process. Although petitioner briefly mentions a substantive due process claim, Pet. at 8, he does not explain his position or provide any authority to support it. Traditionally, substantive due process has been limited to instances when the government *deliberately* deprives someone of life, liberty, or property without a legitimate governmental interest. *Collins v. Harker Heights*, 112 S. Ct. 1061, 1069 n.10 (1992). In the present case, petitioner has not been deprived of a property interest because Alabama arbitrarily decided to deprive him of his property, but because *he* wrongfully caused and contributed to the death of Ms. Sumpter.

B. ALABAMA'S NON-APPORTIONMENT RULE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

Alabama's non-apportionment rule is rationally related to a legitimate state interest and, therefore, does not violate the petitioner's right to equal protection under the laws. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). The purpose of Alabama's wrongful death statute is to punish people who contribute to the negligent destruction of human life and to deter them, and others, from committing future acts which cause or contribute to the death of a human being. *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927).

Moreover, Alabama's non-apportionment rule does not violate substantive due process because the rule furthers a legitimate governmental interest – to punish and to deter people who cause or contribute to the wrongful death of human beings. "[T]he Due Process Clause 'does not purport to supplant *traditional tort law* in laying down rules of conduct to regulate liability for injuries that attend living together in society.' " *Collins*, 112 S. Ct. at 1070 (emphasis added) (quoting *Daniels v. Williams*, 474 U.S. 327, 332 (1986)). Consequently, this Court has generally denied requests to expand the concept of substantive due process in a way that would require a state to affirmatively protect a person's property interest against harm which was not a result of a state's arbitrariness or oppression. *Id.* at 1069. Petitioner's apparent suggestion that this Court *expand* substantive due process in such a way that would require Alabama to protect him from a judgment in a wrongful death case would effectively supplant Alabama's choice of tort laws and the incentives/disincentives it wishes to create thereby.

As petitioner acknowledges (Pet. at 21), the preservation of human life is a legitimate state interest. *See also Pizitz*, 274 U.S. at 116. The non-apportionment rule promotes that interest in wrongful death cases "by making homicide expensive" even for those who may be less culpable than others. *Id; see* Alabama Supreme Court's opinion, *supra* at pp. 8-9. By alerting people to the fact that even a 1% contribution toward the death of a human being can result in liability for the full measure of damages assessed by the jury, Alabama's Wrongful Death Act serves as an especially powerful deterrent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ANDREW T. CITRIN
(Counsel of Record)
MICHAEL A. WOREL
JOHN T. CROWDER, JR.
DAVID G. WIRTES, JR.
CUNNINGHAM, BOUNDS, YANCE,
CROWDER AND BROWN
Post Office Box 66705
Mobile, Alabama 36660
(205) 471-6191

Counsel for Respondent